

**Letter of Findings: 04-20130036**  
**Gross Retail Tax**  
**For the Years 2009, 2010, and 2011**

**NOTICE:** Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of new document in the Indiana Register. The publication of the document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUES**

**I. Missing Invoices – Gross Retail Tax.**

**Authority:** IC § 6-2.5-1-2; IC § 6-2.5-2-1(a); IC § 6-2.5-2-1(b); IC § 6-2.5-3-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-4-1(b), (c); IC § 6-8.1-5-1(c); IC § 6-8.1-5-4(a); IC § 6-8.1-5-4(c); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002).

Taxpayer argues that the sales tax assessment is over-stated and that it can now produce invoice records which were not supplied at the time the original audit took place.

**II. Urethral Stents – Gross Retail Tax.**

**Authority:** IC § 6-2.5-1-18; IC § 6-2.5-5-18(a); [45 IAC 2.2-5-27](#); [45 IAC 2.2-5-28](#); [45 IAC 2.2-5-28\(g\)-\(h\)](#); [45 IAC 2.2-5-36](#).

Taxpayer states that it is not required to pay sales tax when it purchased urethral stents because the purchase of the stents was exempt from the tax.

**III. Leased Medical Equipment – Gross Retail Tax.**

**Authority:** IC § 6-2.5-1-21(3); IC § 6-2.5-4-10(a); IC § 6-8.1-5-1(c).

Taxpayer claims that it is not required to pay sales tax when it rented certain medical devices from its vendor because the vendor supplied an operator with the equipment.

**STATEMENT OF FACTS**

Taxpayer is an Indiana for-profit medical facility. Taxpayer offers various medical procedures to its patients. Taxpayer also operates a cafeteria at its facility.

The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records. According to the audit report, Taxpayer was unable to supply certain requested invoices and related records. The audit determined that Taxpayer had purchased various items for which it had not paid sales tax. The audit concluded that Taxpayer owed additional sales/use tax. Taxpayer disagreed with the audit's determination and submitted a protest to that effect.

As a result of the protest, an administrative hearing was conducted and this Letter of Findings results.

**I. Missing Invoices – Gross Retail Tax.**

**DISCUSSION**

The Department's audit resulted in the assessment of additional sales and use tax. The assessment is attributable to an estimate of Taxpayer's taxable transactions because Taxpayer was unable to provide complete records of those transactions.

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b).

Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). Use means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. Id.; USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466, 468–69 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. Rhoades, 774 N.E.2d at 1048. A taxable retail transaction occurs when; (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-2(a).

In this – as in any assessment of tax – it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie

evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Taxpayer freely admits it was unable to provide complete documentation at the time the original audit occurred. Indiana law provides that, "Every person subject to a listed tax must keep books and records so that the Department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." IC § 6-8.1-5-4(a). Every taxpayer is under that statutory obligation to maintain adequate records but must also "allow inspection of the books and records and returns by the Department or its authorized agents at all reasonable times." IC § 6-8.1-5-4(c).

Taxpayer has belatedly provided copies of invoices which it maintains will affect the amount of the sales/use tax assessment. Perhaps so but Taxpayer has not met its statutory burden of demonstrating that the assessment was "wrong." Nonetheless, the Department is prepared to request that the Audit Division review the additional documentation and to make whatever adjustment it deems justified by that documentation.

#### **FINDING**

Subject to the results of a supplemental audit review, Taxpayer's protest is sustained.

### **II. Urethral Stints – Gross Retail Tax.**

#### **DISCUSSION**

Taxpayer purchases "urethral stints" which it argues are not subject to sales or use tax. Without specifically stating as much, Taxpayer apparently relies on IC § 6-2.5-5-18(a) which states in relevant part:

Sales of durable medical equipment, prosthetic devices, artificial limbs, orthopedic devices, dental prosthetic devices, eyeglasses, contact lenses, and other medical supplies and devices are exempt from the state gross retail tax, if the sales are prescribed by a person licensed to issue the prescription. (Emphasis added).

IC § 6-2.5-1-18 provides a definition of "Durable medical equipment" as follows:

(a) "Durable medical equipment" means equipment, including repair and replacement parts for the equipment, that:

- (1) can withstand repeated use;
- (2) is primarily and customarily used to serve a medical purpose;
- (3) generally is not useful to a person in the absence of illness or injury; and
- (4) is not worn in or on the body. The term does not include mobility enhancing equipment.

(b) As used in this section, "repair and replacement parts" includes all components or attachments used in conjunction with durable medical equipment.

Therefore, sales of "durable medical equipment" and supplies may be exempt if the equipment is "prescribed." The Department's regulation, [45 IAC 2.2-5-27](#), explains:

(a) The term "person licensed to issue a prescription" shall include only those persons licensed or registered to fit and/or dispense such devices. (b) Definition: The term "prescribed" shall mean the issuance by a person described in paragraph 1 of this regulation [subsection (a) of this section] of a certification in writing that the use of the medical equipment supplies and devices is necessary to the purchaser in order to correct or to alleviate a condition brought about by injury to, malfunction of, or removal of a portion of the purchaser's body. (Emphasis added).

Under IC § 6-2.5-5-18(a) and [45 IAC 2.2-5-27](#), a person having a "condition brought about by injury, malfunction of, or removal of a portion of the purchaser's body," may be eligible for a sales tax exemption if the "person" receives a proper prescription for the "medical equipment supplies and devices."

The Department's regulation [45 IAC 2.2-5-28](#)(g)-(h) repeats the qualification necessary to qualify for the exemption:

(g) The sale to the user of medical equipment, supplies, or devices prescribed by one licensed to issue such a prescription are exempt from sales and use tax. (h) The term "medical equipment, supplies or devices", as used in this paragraph, are those items, the use of which is directly required to correct or alleviate injury to malfunction of, or removal of a portion of the purchaser's body.

Under IC § 6-2.5-5-18(a) and [45 IAC 2.2-5-28](#), sales of prescribed "durable medical equipment" are exempt if they are necessary to "correct or alleviate injury to, malfunction of, or removal of a portion of the purchaser's body."

Taxpayer has established that the stents are prescribed to patients, that the stents fall within the definition of "durable medical equipment", that the stents are required to alleviate injury to or malfunction of the purchaser's body, and that the stents are not "medical supplies consumed in professional use. (See [45 IAC 2.2-5-36](#)) As such, the stents fall within the exemption set out in IC § 6-2.5-5-18(a).

#### **FINDING**

Taxpayer's protest is sustained.

### **III. Leased Medical Equipment – Gross Retail Tax.**

#### **DISCUSSION**

Taxpayer argues that it was not required to pay sales tax when it rented a heart lung machine from a vendor called Heme Management. Taxpayer states that the rental of the medical device is exempt because Heme Management provided personnel who accompanied and operated the medical device.

IC § 6-2.5-4-10(a) imposes tax on the rental of "tangible personal property" such as Taxpayer's medical device.

A person, other than a public utility, is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person other than for subrent or sublease.

IC § 6-2.5-1-21(3) in relevant part states that a "lease" does not include:

[P]roviding tangible personal property along with an operator for a fixed or indeterminate period, if: (A) the operator is necessary for the equipment to perform as designed; and (B) the operator does more than maintain, inspect, or set up the tangible personal property.

To the extent that Taxpayer provided specific invoices establishing that Taxpayer rented the medical device along with a "Labor Service Fee," Taxpayer's protest is sustained because Taxpayer has met its burden under IC § 6-8.1-5-1(c) of establishing that imposition of tax on the these particular transactions is "wrong."

**FINDING**

Taxpayer's protest is sustained.

*Posted: 07/31/2013 by Legislative Services Agency*

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